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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THE BANK OF NEW YORK, as Collateral Trustee, NEW JERSEY NATIONAL BANK, HARRIS TRUST AND SAVINGS BANK, and BOATMEN'S FIRST NATIONAL BANK OF OKLAHOMA, as First, Second and Third Series Trustees, respectively,

Petitioners,

vs.

CONTINENTAL AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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235 pp

QUESTIONS PRESENTED

During its Chapter 11 reorganization case, Continental told the Bankruptcy Court that investors would not invest in its reorganization and that Continental would remain in bankruptcy unless Petitioners' $117 million administrative claim for adequate protection was disallowed and the disallowance incorporated into the order confirming Continental's plan of reorganization. The Bankruptcy Court then incorporated its order disallowing Petitioners' administrative claim into the confirmation order so that Petitioners' appeal to obtain review of the disallowance would be equitably moot. The District Court thereafter dismissed Petitioners' appeal as equitably moot even though Continental's Plan of Reorganization provided for the post-confirmation allowance and payment of administrative claims like Petitioners' adequate protection claim. The Court of Appeals for the Third Circuit, in a 7-6 *in banc* decision, affirmed. The four questions presented for review are:

1. Whether the judicially created doctrine of equitable mootness should be interpreted to permit federal district courts and courts of appeals to refuse to entertain the merits of live bankruptcy appeals over which they indisputably possess statutory jurisdiction and in which they plainly can provide relief that would not imperil the debtor's reorganization or upset any reasonable reliance interest?

2. Whether this Court should resolve the conflict among the circuits with respect to the scope of the equitable mootness doctrine so that Article III courts will be required to review bankruptcy court orders disallowing administrative claims after the plan of reorganization has been consummated as long as effective relief can be fashioned in favor of the creditor that would not imperil the debtor's reorganization or upset any reasonable reliance interest?

3. Whether a bankruptcy judge should have the power to deny a creditor its statutory right to have the order disallowing its administrative claim reviewed by an Article III court because investors refuse to fund the debtor's reorganization

unless the creditor's claim is disallowed and the disallowance incorporated into the confirmation order so that it will not be subject to appellate review?

4. Whether an appeal from a bankruptcy court's order disallowing an administrative claim should be resolved on the merits when the debtor's plan of reorganization provides for the post-confirmation allowance of the claim, and the district court, before dismissing the appeal as equitably moot, held that the creditor likely would have prevailed on the merits?

PARTIES TO THE PROCEEDING BELOW

The Bank of New York, NationsBank of Tennessee, N.A., New Jersey National Bank, Harris Trust and Savings Bank, and Boatmen's First National Bank of Oklahoma were the appellants before the United States Court of Appeals for the Third Circuit. Continental Airlines, Inc. was the appellee.

RULE 29.6 LIST

The Bank of New York is wholly-owned by the Bank of New York Company, Inc. The Bank of New York has the following non-wholly-owned subsidiaries: BNY Waterworks, Inc., Island Waterworks, Inc., Northern Waterworks, Inc., Waterwheel, L.P., Banco Credibanco S.A., Wing Hang Bank, Limited, and Sloane Holding, Inc.

New Jersey National Bank is wholly-owned by CoreStates Financial Corp. New Jersey National Bank has the following non-wholly-owned subsidiaries: Eagle 1851, Inc., Seven Hundred Town Lake Properties, Inc., One Hundred Avondale Estates Properties, Inc., Two Hundred Henderson Place Properties, Inc., Three Hundred Paces Mill Properties, Inc., Four Hundred Ridgefield Properties, Inc., Five Hundred Ridgecreek Properties, Inc., Westpark Walk, Inc., Sungate Boulevard Corporation, Morris Avenue Corporation, and Barnegat Hills Corporation.

Harris Trust and Savings Bank is wholly-owned by Harris Bankcorp, Inc., which is wholly-owned by Bankmont Financial Corp., which is wholly-owned by the Bank of Montreal. Harris Trust and Savings Bank has no non-wholly-owned subsidiaries.

Boatmen's First National Bank of Oklahoma is wholly-owned by Boatmen's Bancshares, Inc. Boatmen's First National Bank of Oklahoma has no non-wholly-owned subsidiaries.

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CONTINENTAL AIRLINES, INC.,

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FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Bank of New York, New Jersey National Bank, Harris Trust and Savings Bank, and Boatmen's First National Bank of Oklahoma ("Petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit, sitting *in banc*.

OPINIONS BELOW

The *in banc* opinion of the Court of Appeals for the Third Circuit (App., *infra*, 1a-38a) is reported at 91 F.3d 553. The opinions of the District Court for the District of Delaware (App., *infra*, 104a-109a; 101a-103a) are unreported. The opinions of the Bankruptcy Court for the District of Delaware (App., *infra*, 110a-121a; 187a-198a) are reported at 154 B.R. 176 and 146 B.R. 536.

JURISDICTION

The Court of Appeals, sitting *in banc*, entered its judgment on July 31, 1996 (App., *infra*, 39a-40a). The original panel's opinion was handed down on February 7, 1996, and withdrawn on March 27, 1996, when the Court agreed to rehear Petitioners' appeal *in banc*. (App., *infra*, 75a-100a; 74a.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case arises out of the chapter 11 bankruptcy proceedings of Continental Airlines in the Bankruptcy Court for the District of Delaware. The Bankruptcy Court had jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334. The District Court had jurisdiction pursuant to 28 U.S.C. § 158(a). The Third Circuit had jurisdiction pursuant to 28 U.S.C. § 158(d).

A. The Parties

Petitioners are trustees for equipment trust certificate holders who provided Continental with $350 million in operating capital under a Secured Equipment Indenture in 1987. The certificates were secured by a collateral pool of 29 aircraft and 81 additional jet engines. The collateral affected approximately one-third of Continental's fleet. (JA 216-17; App., *infra*, 115a.) On December 3, 1990, Continental filed for protection under Chapter 11 of the Bankruptcy Code and, shortly thereafter, defaulted on the payment of interest and principal due under the Indenture. Petitioners asserted a secured claim against Continental on behalf of the certificate holders in an aggregate amount of more than $180 million, the amount still due under the Indenture. (JA 217-18.)

For the almost 2½ years of its Chapter 11 case, Continental used Petitioners' collateral to generate millions of dollars in revenue as it successfully reorganized. During that 2½ years, Continental paid Petitioners nothing. Meanwhile, Petitioners' collateral was declining precipitously in value. (JA 170-212; 974-1034.)

B. The Motion to Modify the Automatic Stay to Provide for Adequate Protection Pursuant to 11 U.S.C. §§ 362(d) and 363(e)

In February, 1991, shortly after Continental filed for bankruptcy, Petitioners' predecessors-in-interest moved for adequate protection as an administrative claim, pursuant to 11 U.S.C. § 363(e), for the decline in the collateral's value. (JA 16-46.) On June 28, 1991, Petitioners re-filed their motion to seek "an order modifying the automatic stay" to provide for adequate protection and for "such other and further relief as is just" pursuant to 11 U.S.C. §§ 362(d) and 363(e) (JA 47-115.) Continental opposed the motions on the ground, among others, that Petitioners had to move to lift the automatic stay in order to be entitled to adequate protection for market value decline. Continental, however, never offered to abandon the collateral and continued to use it. In fact, because the collateral affected one-third of Continental's fleet, repossession of the collateral would have prevented any reorganization. (App., *infra*, 115a, 120a.) Hearings were held on the adequate protection claim in September, 1991.

On August 27, 1992, almost one year after the hearing, the Bankruptcy Court rejected Continental's argument that Petitioners' had to move to lift the stay in order to be entitled to adequate protection:

> [T]he court does not agree that adequate protection may only be sought in conjunction with a lift stay motion. While typically they are brought as alternatives, there is no such explicit requirement in the Code. In fact, the existence of section 363(e) would imply that adequate protection may be sought independently.

(*In re Continental Airlines, Inc.*, 146 B.R. 536 (Bankr. D. Del. 1992), annexed as App., 187a-198a). The Court also found, however, that the collateral had not declined in value through July, 1991, and, on that basis, denied Petitioners' motion. (App., *infra*, 197a.)

C. The Lift Stay Motion and the Renewed Motion for Adequate Protection

On August 14, 1992, prior to the denial of the original motion for adequate protection, Petitioners made a separate motion to lift the automatic stay. On September 14, 1992, after the original motion for adequate protection was denied, Petitioners filed a renewed motion for adequate protection with the Bankruptcy Court for the period after July, 1991. (JA 243-53.) Continental opposed the lift stay motion and the motion for adequate protection. (JA 254-86.) The hearings on the renewed motion began on November 3, 1992 and continued through February 5, 1993. During those hearings, the evidence adduced by all the parties established that Petitioners' collateral had suffered a tremendous decline in value. Even Continental's own evidence indicated that the market value of Petitioners' collateral had fallen by almost $23 million from July 1991 through October 1992. (JA 1139-42; 1664-65.)

D. Continental's Plan of Reorganization Provided that Disputed Administrative Claims Survive the Plan's Confirmation and Become Potential Post-Confirmation Obligations of the Reorganized Continental

In January, 1993, Continental filed its second amended plan of reorganization (the "Plan" or "Plan of Reorganization"). (JA 615-814.) The Plan contemplated an investment of $450 million in Continental's reorganization by Air Canada, Air Partners and various other parties (the "Investors") in exchange for approximately 65% of the reorganized company. Under sections 5.5(C) and 10.1 of Plan, disputed administrative claims, such as Petitioners' claim for adequate protection, would survive the Plan's confirmation and become potential post-confirmation obligations of the reorganized Continental. (JA 656; 691.) Under a separate agreement that was not part of the Plan, the Investors placed certain conditions on their investment including a cap on the amount of administrative claims to be assumed by the reorganized airline. (JA 391-414.)

E. Petitioners' Motion for a Deposit to Preserve Their Adequate Protection Claim Was Opposed by Continental on the Grounds that Continental's Plan of Reorganization Provided that Petitioners' Administrative Claim Would Be Paid by the Reorganized Continental if the Claim Were Allowed After Confirmation

By late January, 1993, Petitioners' renewed motion for adequate protection had not been fully heard by the Bankruptcy Court even though Continental had filed its Plan of Reorganization. Petitioners, therefore, moved to require Continental to establish a cash deposit to preserve the administrative priority status of their adequate protection claim if Continental emerged from bankruptcy as a reorganized debtor. Continental opposed Petitioners' motion by arguing that a deposit was unnecessary because the Plan provided for the post-confirmation allowance and payment of adminsitrative claims:

> There is no doubt that the Plan's definition of Administrative Claim specifically includes [Petitioners'] claim for adequate protection, if any.
>
> * * * *
>
> Sections 5.5(C) and 10.1 of the Plan clearly provide that [Petitioners'] Administrative Claims, if any, will be assumed as an obligation of NewCal [*i.e.*, reorganized Continental] and paid, if and when allowed.

(JA 1038-39.)

F. At the Confirmation Hearings, Continental Told the Bankruptcy Court that the Investors Would Not Invest Unless the Court Disallowed the Petitioners' Administrative Claim for Adequate Protection and Included the Disallowance in the Confirmation Order

On March 16, 1993, the hearings on Continental's proposed Plan of Reorganization began. Petitioners' renewed adequate protection motion, lift stay motion and deposit motion still had not been decided by the Bankruptcy Court. Petitioners' $117 million adequate protection claim was at most 2 1/2% of all Continental's administrative liabilities. Nevertheless, during the confirmation hearings, Continental argued that if Petitioners' adequate protection claim were allowed, the cap on administrative claims set by the Investors would be exceeded. (That cap, however, was not part of the Plan. Rather, it was set out in a separate agreement between Continental and the Investors.) Continental, therefore, advised the Bankruptcy Court that unless the Court disallowed Petitioners' claim for adequate protection and incorporated the disallowance into the confirmation order so that it would not be subject to review on appeal, the Investors would not make their investment in the reorganization and Continental would remain in bankruptcy. (App., *infra*, 27a; JA 1399-1402.) Petitioners objected both to the disallowance and to the incorporation of the disallowance into the confirmation order. (JA 1400.)

On April 16, 1993 -- the same day it confirmed Continental's Plan of Reorganization -- the Bankruptcy Court disallowed Petitioners' administrative claim for adequate protection and incorporated that disallowance into the confirmation order so that the separate ruling on the adequate protection claim could only be appealed as part of an appeal from the confirmation order. (App., *infra*, 110a-121a; 137a; 161a; 175a-186a.) The Bankruptcy Court held that even if the Petitioners' collateral had declined in value, Petitioners were not entitled to adequate protection for any decline that took place before they moved to lift the automatic stay. (*In re*

Continental Airlines, Inc., 154 B.R. 176 (Bankr. D. Del. 1992), annexed as App., 110a-121a). That holding directly contradicted the Court's prior published decision that Petitioners did not need to move to lift the stay in order to receive adequate protection. *Compare* App., *infra*, 117a-118a *with* App., *infra*, 194a. Also, contrary to the evidence presented by both Petitioners and Continental, the Bankruptcy Court held that the collateral had not declined in value after the Petitioners moved to lift the stay in August 1992. Thus, the Bankruptcy Court disallowed Petitioners' entire claim for adequate protection. The Bankruptcy Court also denied Petitioners' motion to lift the stay because the collateral was essential to an effective reorganization. (App., *infra*, 120a.)

G. The District Court Refused to Grant a Stay and Dismissed Petitioners' Appeal From the Disallowance of Their Adminsitrative Claim as Equitably Moot

After the Bankruptcy Court disallowed their claim for adequate protection, Petitioners sought expedited review of the Bankruptcy Court's order, filing their brief on appeal with the District Court on April 22, 1993 (six days after the confirmation order was signed) and sought a conditional stay of Continental's Plan of Reorganization. (JA 1614-1667.)

1. The Request for a Stay

In response to the request for a stay, Continental sought a bond in the amount of $450 million. (JA 1973; App., *infra*, 99a.) Petitioners were unable to post a bond anywhere near that magnitude because they were trustees of the certificate holders and had not been paid anything by Continental since it filed for bankruptcy 2 1/2 years earlier. Although the District Court concluded that "it is likely [Petitioners] will prevail" on appeal, it nevertheless denied the stay because Petitioners were "unable to post a bond satisfactory to the Court." (JA 1755-56; App., *infra*, 28a.)

A short time thereafter, the Investors made their investment and the Plan of Reorganization was substantially

consummated. At the time the Investors committed their funds, the Investors knew (1) that Petitioners' appeal from the disallowance of their administrative claim for adequate protection was pending, and (2) that Continental's Plan of Reorganization required the reorganized Continental to pay the Petitioners' administrative claim, if and when allowed, even if that allowance took place on appeal after consummation of the Plan. (App., *infra*, 36a-37a; 96a-97a.)

2. Petitioners' Appeal

Because the Plan of Reorganization expressly provided for the post-confirmation allowance and payment of their claim, Petitioners' appeal did not seek to overturn the confirmation order except insofar as it incorporated the disallowance of their claim for adequate protection. Nor did Petitioners seek to undo Continental's Plan of Reorganization or any transfers made pursuant to the Plan. Rather, Petitioners only sought a substantive review of (1) the Bankruptcy Court's unprecedented decision that Petitioners had to move to lift the automatic stay in order to receive adequate protection, and (2) the Court's clearly erroneous holding that the collateral had not declined in value after the lift stay motion. If Petitioners were successful on appeal, the reorganized Continental would then be obligated to pay the administrative claim pursuant to Sections 5.5(C) and 10.1 of the Plan -- as the Investors knew when they made their investment in the reorganized airline.

On appeal, Continental -- despite having argued on the deposit motion in February, 1993, that Petitioners' administrative claim for adequate protection would "be assumed as an obligation of NewCal and paid, if and when allowed" (JA 1039) -- now argued in April, 1993, that Petitioners' appeal should be dismissed as equitably moot. (JA 1771-1818). On December 30, 1993, eight months and one week after Petitioners filed their brief on their appeal to the District Court, the District Court granted Continental's motion to dismiss. The District Court held that Petitioners' appeal should not be reviewed on the merits because Petitioners had failed to obtain a stay, substantial consummation had occurred, and the

Investors had purportedly relied on the disallowance of Petitioners' administrative claim when they invested in the reorganized Continental. (App., *infra*, 104a-109a.) The District Court, therefore, refused to review on the merits the Bankruptcy Court's decision denying Petitioners' motion for adequate protection.

3. Petitioners' Motion for a Rehearing

The Petitioners moved for a rehearing of the District Court's dismissal of their appeal, relying on the Second Circuit's intervening decision in *Frito-Lay, Inc. v. LTV Steel Co., Inc. (In re Chateaugay Corp.)*, 10 F.3d 944 (2d Cir. 1993). That decision held that confirmation and substantial consummation of a plan of reorganization do not render an appeal by an administrative claimant moot if meaningful relief can be fashioned in favor of the claimant without imperiling the reorganization or upsetting any reasonable reliance interest. *Id.* at 952-54. Petitioners' motion for rehearing was denied over eight months later. (App., *infra*, 101a-103a.)

H. The *In Banc* Court's Majority Opinion

On appeal to the Third Circuit, a divided panel affirmed the District Court's dismissal of Petitioners' appeal, resulting once again in a failure to review on the merits the Bankruptcy Court's denial of the Petitioners' $117 million administrative claim for adequate protection. (App., *infra*, 75a-100a.) The Court of Appeals granted Petitioners' request for rehearing *in banc* and withdrew the panel's opinion. (App., *infra*, 74a.) During oral argument before the *in banc* Court, Continental conceded that it was not making the argument that if the Third Circuit reversed, "Continental is going to suddenly stop flying." (App., *infra*, 69a-70a.) Effective relief, therefore, is plainly available without disrupting the Plan of Reorganization. Nevertheless, on July 31, 1996, the Court -- in a 7-6 decision -- again affirmed the District Court's dismissal of Petitioners' appeal as equitably moot. (App., *infra*, 1a-38a.)

The majority opinion, written by Chief Judge Sloviter, held that bankruptcy appeals from orders denying administrative

claims can be dismissed as "equitably moot" even though effective relief can be fashioned in favor of the appellant without upsetting any reasonable reliance interest or imperiling the reorganization if it "would be neither prudent nor equitable" for the reviewing court to decide the appeal on the merits. (App., *infra*, 8a-10a, 26a.) The majority held that equitable mootness is a *discretionary* determination to be made in the first instance by the District Court by balancing five prudential considerations. The District Court's discretionary determination is then reviewed by the Court of Appeals only for an abuse of discretion. (App., *infra*, 12a.)

In affirming the dismissal of the Petitioners' appeal, the majority noted that the District Court had considered that a stay had not been obtained, substantial consummation had occurred, and the Investors had purportedly relied on the disallowance of the Petitioners' adequate protection claim in committing funds to Continental's reorganization. (App., *infra*, 14a.) Whether the Investors' reliance was unreasonable under the circumstances, given the pendency of the Petitioners' appeal, was simply not germane. (App., *infra*, 22a-23a.) Nor was the fact that Continental's Plan of Reorganization clearly provided for the post-confirmation allowance and payment of the Petitioners' claim. (App., *infra*, 23a-24a.) Thus, the Court of Appeals again refused to review the Bankruptcy Court's legal, substantive decision disallowing Petitioners' administrative claim for adequate protection.

The most critical consideration in the majority's view was their policy determination that the dismissal of Petitioners' appeal would facilitate reorganizations by encouraging investors to invest in reorganizing debtors without having to be concerned that the reorganized company could later be held liable for additional claims asserted against the estate. (App., *infra*, 22a-23a.) In reaching this conclusion, the Court did not even pay lip service to the bankruptcy court's obligation to adjudicate creditors' administrative claims on the merits. Rather, the majority effectively ruled that the concerns of prospective investors should come before the substantive legal rights of creditors, including the statutory right of creditors to

have the decisions of the bankruptcy court reviewed on the merits by an Article III court.

I. The *In Banc* Dissent

In a dissent joined in by five other Judges, Judge Alito posed the issue that is the basis for the first question presented here for review:

> The majority adopts the curious doctrine of "equitable mootness," which it interprets as permitting federal district courts and courts of appeals to refuse to entertain the merits of live bankruptcy appeals over which they indisputably possess statutory jurisdiction and in which they can plainly provide relief.

(App., *infra*, 27a.) Judge Alito noted that the majority's policy concerns -- that investors should be encouraged to invest in reorganizing debtors and then protected from appeals of orders disallowing administrative claims through the doctrine of equitable mootness -- did not justify the Court's refusal to review substantive decisions on the merits:

> [N]either of these policies justifies what has happened in this case -- the refusal of the Article III courts to entertain a live appeal over which they indisputably possess statutory jurisdiction and in which meaningful relief can be awarded.

(App., *infra*, 34a.)

With respect to the Investors' so-called reliance, the dissent was "skeptical about the reliance interests that are claimed here, but in any event [we] fail to see why" reliance should be a threshold issue rather than one of remedy. (App., *infra*, 37a). The dissent also noted that:

> The Trustees are not seeking to upset the plan of reorganization; rather, they are attempting to obtain payments that they claim are due to them pursuant to that plan.

(App., *infra*, 34a.)

Finally, the dissent criticized the majority's decision as "unjustified and unjust," as "fly[ing] in the face of the language of the plan" and as creating "bad precedent" because it "slams the courthouse door on [Petitioners] before they are even heard on the merits" despite the fact that effective relief can be granted without imperiling Continental's reorganization or upsetting any reasonable reliance interest. (App., *infra*, 27a, 35a, 36a, 38a.) The majority had adopted an overly "broad" standard for the "equitable mootness" doctrine which standard was not consistent with the law of all the Circuits which the majority claimed to be following. For example, the Eleventh Circuit has framed the issue as whether a reorganization plan "has been so substantially consummated *that effective relief is no longer available*" -- an inquiry that the dissent noted is "quite different" from the majority's indeterminate discretionary balancing test. (App, *infra*, 29a-30a.)

REASONS FOR GRANTING THE WRIT

Unless reviewed by this Court and reversed, the decision below will have profound ramifications for future cases. Under 28 U.S.C. § 158, a creditor has a statutory right to appeal final orders of the Bankruptcy Court to the District Court. Under the majority's analysis, however, a bankruptcy judge's decisions on critical legal issues, such as those involved here, will not be reviewed on a substantive basis. Rather, the decision will allow Article III courts to exercise discretion to hear statutory appeals, even though effective relief plainly could be fashioned without imperiling the debtor's reorganization or upsetting any reasonable reliance interest.

The decision of the Bankruptcy Court on the Petitioners' administrative claim for adequate protection was not discretionary -- rather, it dealt with Petitioners' substantive legal rights. The decision came after Continental told the Bankruptcy Court that the Investors would not make their investment unless Petitioners' claim was denied and any appeal made moot. (*See* App., *infra*, 27a.) Under the majority's holding, therefore, a bankruptcy court can make errors of law,

or clearly erroneous findings of fact, on the merits of a creditor's substantive claims, incorporate those errors in an order confirming a plan of reorganization and, thus, transform a creditor's statutory right to review into a matter of discretion. It is for Congress, however -- not the federal judiciary -- to decide when a party's statutory right of appeal should be circumscribed. Indeed, Congress has done just that in 11 U.S.C. §§ 363(m) and 364(e).

As Judge Alito and the five other Judges who joined his dissent noted, the decision to allow Article III courts the discretion to avoid hearing live appeals is "unjustified and unjust", and creates "bad precedent" because it results in the courthouse door being slammed on parties before they are heard on the merits even though effective relief can still be fashioned in their favor. (App., *infra*, 27a, 35a, 38a.)

Moreover, the majority's standard for equitable mootness departs from the equitable mootness standard adopted by the Second, Fourth, Eleventh and District of Columbia Circuits. Those Circuits -- as Judge Alito noted -- more appropriately focus on the issue of whether *effective relief* remains available, as a practicable matter, under all the circumstances. (App., *infra*, 29a-30a.) The majority's analysis also wrongly treats the issue of equitable mootness as a threshold question, rather than as a remedial consideration, to be considered in fashioning an appropriate remedy after the merits of the appeal have been decided.

The majority's decision also creates a great deal of uncertainty for future reorganization cases. Under Sections 5.5(C) and 10.1 of Continental's Plan of Reorganization, Petitioners were entitled to have their administrative claim for adequate protection allowed and paid after confirmation. (JA 656; 691.) By permitting substantive appeals to be dismissed as equitably moot even though the debtor's plan of reorganization clearly provides for the post-confirmation allowance and payment of the claim in question, the majority's decision has undermined the ability of creditors to rely on the treatment accorded their claims by a plan of reorganization. No other

federal appeals court has ever held that a bankruptcy appeal can be dismissed as equitably moot where a party is merely seeking relief that is contemplated under the plan of reorganization.

Finally, as the dissent to the Panel's opinion noted, the decision below, by placing so much weight on the necessity of obtaining a stay pending appeal, will result in non-Article III bankruptcy judges "exercis[ing] a distressing measure of unreviewable authority" because of the practical difficulties appellants will face in posting a bond in large reorganizations. (App., *infra*, 99a.) This is particularly disturbing in a case such as this one -- where the circumstances surrounding the issuance of the order in question indicate that close appellate review was particularly warranted. *See* App., *infra*, 27a-28a.

I.

THE DECISION BELOW WILL HAVE SIGNIFICANT RAMIFICATIONS FOR FUTURE CHAPTER 11 CASES BECAUSE IT WRONGLY ALLOWS ARTICLE III COURTS TO REFUSE TO HEAR THE MERITS OF LIVE BANKRUPTCY APPEALS OVER WHICH THEY INDISPUTABLY HAVE STATUTORY JURISDICTION AND IN WHICH THEY CAN PLAINLY PROVIDE RELIEF

Congress gave Petitioners the statutory right to have the Bankruptcy Court's decision denying their $117 million administrative claim for adequate protection reviewed on the merits. *See* 28 U.S.C. § 158. Where, as here, the statutory right of review can result in effective relief being granted without upsetting the plan of reorganization or any reasonable reliance interest, the courts should not "rewrite" the statute to give Article III courts the discretion to deny a party its right to appeal. Indeed, this Court has put strict limits on the judiciary's power to adopt judicially created rules affecting a party's statutory rights. *See, e.g., O'Melveny & Myers v. Federal Deposit Insurance Corp.*, 512 U.S. 79 (1994); *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981);

City of Milwaukee v. Illinois and Michigan, 451 U.S. 304 (1981).

By affirming the District Court's dismissal of Petitioners' appeal, however, the majority has now given non-Article III bankruptcy courts the power to deny valid administrative claims on improper grounds and then take steps purposefully to insulate their decisions from appellate review -- so long as doing so would "facilitate" the debtor's reorganization. This should not be the law. Although rehabilitation and successful reorganizations are important objectives of Chapter 11, those ends "do[] not justify the use of any means." *Shapiro v. Saybrook Mfg. Co. (In re Saybrook Mfg. Co.)*, 963 F.2d 1490, 1496 (11th Cir. 1992). As the Third Circuit observed in another *in banc* decision, a Chapter 11 debtor should not be permitted to reorganize at the expense of its secured creditors. *See RTC v. Swedeland Dev. Group, Inc. (In re Swedeland Dev. Group, Inc.)*, 16 F.3d 552, 568 (3d Cir. 1994) (*in banc*).

It is for Congress -- not the judiciary -- to determine whether policies such as encouraging investments in reorganizations warrant circumscribing a party's statutory right to appeal. Indeed, Congress has made just such determinations in various parts of the Bankruptcy Code. *See* 11 U.S.C. §§ 363(m) and 364(e). In concluding that the "mootness" of the Petitioners' appeal could be assessed independently of the "effective relief" test, based on five "equitable" or "prudential" factors, the majority wrongly held that Article III courts have the *discretion* to decline entertaining the merits of live bankruptcy appeals over which they clearly possess statutory jurisdiction and in which they plainly can provide meaningful relief. As this Court has noted in another context, federal courts have a "virtually unflagging obligation" to exercise the jurisdiction that Congress has given them. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976). Indeed, only last Term, this Court reaffirmed the principle that a federal court may not decline to exercise its statutory jurisdiction if it lacks discretion over whether to grant or deny relief. *Quackenbush v. Allstate Insurance Co.*, 116 S. Ct. 1712 (1996).

The majority's analysis also places undue emphasis on whether a stay of confirmation has been obtained, and therefore will -- as Judge Alito wrote in his dissent to the original panel's decision -- result in bankruptcy judges "exercis[ing] a distressing measure of essentially unreviewable authority." (App., *infra*, 99a). The simple fact is that in a reorganization involving over $7 billion in liabilities and $4 billion in assets, a creditor is unlikely to be able to post a bond that would have any significance compared to the value of the bankruptcy estate. Thus, should the failure to obtain a stay be given dispositive weight in determining whether an appeal is equitably moot, the result will be that the larger the reorganization, the greater the likelihood that the appeal will be dismissed as moot.

In any event, little weight should have been given to the stay issue here. If the Bankruptcy Court had made a separate and prompt ruling denying the administrative claim for adequate protection, no bond would have been required in order to take an appeal, and -- indeed -- no issue of mootness would have arisen. It was only by virtue of the incorporation of the disallowance of the Petitioners' administrative claim for adequate protection into the confirmation order that the Bankruptcy Judge and the majority's opinion required Petitioners to post a bond even larger than their administrative claim to prevent their appeal from becoming equitably moot. While a bankruptcy court may be a court of equity, there is little that is equitable in such a procedural practice.

II.

THE MAJORITY'S DECISION ALLOWS CHAPTER 11 DEBTORS' AND INVESTORS' INTERESTS TO BE GIVEN UNREVIEWABLE WEIGHT IN DETERMINING THE SUBSTANTIVE RIGHTS OF CREDITORS

The majority has effectively given chapter 11 debtors and investors a new means for eviscerating *valid* claims that are perceived as standing in the way of a reorganization without having to be concerned about appellate review. During the

confirmation hearings, Continental advised the Bankruptcy Court that the Investors would not invest in the reorganization unless Petitioners' administrative claim was disallowed and the disallowance incorporated into the confirmation order. (App., *infra*, 27a; JA 1399-1402.) Based on these assertions, the Bankruptcy Court -- in an unprecedented construction of the Bankruptcy Code which directly contradicted the Court's prior decision -- disallowed Petitioners' adequate protection claim and incorporated that disallowance into the confirmation order. (App., *infra*, 110a-121a.)

The Bankruptcy Court's decision was simply wrong as a matter of law. *See Bankruptcy Law Letter*, Vol. 13, No. 9, p. 8 (Sept. 1993). There is no basis in the Bankruptcy Code or in any reported decision of any court for the decision. Moving to lift the stay in order to obtain adequate protection is not only not required, it would have been essentially a futile act because the collateral was essential to the success of Continental's reorganization. Indeed, the District Court held that Petitioners would likely prevail on the merits if their appeal was heard, but then dismissed the appeal as equitably moot. Thus, the holdings below have legitimized the ability of debtors and their prospective new owners to pressure bankruptcy courts into denying valid administrative claims and then insulate their decisions from appellate review.

III.

THE DECISION BELOW "FLIES IN THE FACE" OF THE PLAN OF REORGANIZATION AND, THEREFORE, WILL INTRODUCE WIDESPREAD UNCERTAINTY IN CONFLICT WITH WELL ESTABLISHED LAW ABOUT THE EFFICACY OF PLANS OF REORGANIZATION

The decision below will also lead to a great deal of uncertainty for future reorganizations because creditors will no longer be able to rely on the treatment accorded their claims by a plan of reorganization. Under Sections 5.5(C) and 10.1 of Continental's Plan of Reorganization, Petitioners' adequate protection claim could be allowed on appeal subsequent to

confirmation. (JA 656; 691.) Indeed, Continental itself had stated in the Bankruptcy Court that Petitioners' administrative claim would be paid by the reorganized Continental if and when allowed. (JA 1038-39.) Sections 5.5(C) and 10.1 of Continental's Plan -- of which the Investors were fully aware -- reflect prevailing bankruptcy practice, in which a Chapter 11 debtor defers objecting to claims until late in the case when a plan of reorganization is about to be filed and the plan provides that the bankruptcy court will retain jurisdiction after confirmation to resolve the objections. *See Collier on Bankruptcy*, ¶¶ 502.01[3], 1142.01[a] (15th ed. 1995). Nevertheless, the courts below concluded that Petitioners' appeal should be dismissed as equitably moot.

Before the majority's decision, the law had been clear that once confirmation occurred, the rights and liabilities of the parties were fixed and governed by the provisions of the plan. *See Paul v. Monts*, 906 F.2d 1468, 1471 (10th Cir. 1990) ("confirmation of a plan * * * binds creditors and other parties in interest"); *In re Seminole Park & Fairgrounds, Inc.*, 502 F.2d 1011, 1014 (5th Cir. 1974) ("[w]hatever the plan calls for must be done"). Indeed, parties -- such as the Investors -- who received an equity interest in the reorganized debtor were regarded as being statutorily bound by the provisions of a plan of reorganization. *See* 11 U.S.C. § 1141(a). Plan confirmation had never before been held to moot the adjudication of discrete contested matters or adversary proceedings in Chapter 11 reorganizations. *See Frito-Lay, Inc. v. LTV Steel Co., Inc. (In re Chateaugay Corp.)*, 10 F.3d 944 (2d Cir. 1993); *see also In re Seidler*, 44 F.3d 945, 948-949 (11th Cir. 1995), and cases cited therein. Now, however, the ultimate allowance and payment of creditors' administrative claims is far less certain and has become dependent on the subjective expectations of third parties.

IV.

THE COURTS OF APPEALS HAVE ADOPTED CONFLICTING STANDARDS FOR DETERMINING WHETHER A BANKRUPTCY APPEAL IS EQUITABLY MOOT

As Judge Alito observed below, the doctrine of "equitable mootness" is not really about mootness at all. (App., *infra*, 30a-31a.). It appears to have been derived from former Bankruptcy Rule 805,[1] as well as a number of early cases involving sales of a debtor's property to third parties. *See, e.g., A & H Holding Corp. v. O'Donnell (In re Abingdon Realty Corp.)*, 530 F.2d 588 (4th Cir. 1976). Those authorities stood for the proposition that an order of a bankruptcy court approving a sale or loan transaction between a debtor and a good faith purchaser should not be disturbed by a reviewing court unless the party challenging the transaction had obtained a stay pending appeal and thereby prevented its consummation.

Early cases relied on this principle to dismiss bankruptcy appeals where the reviewing court was precluded from granting any effective relief at all because the challenged transactions could no longer be undone. *See, e.g., Trone v. Roberts Farms, Inc. (In re Robert Farms, Inc.)*, 652 F.2d 793 (9th Cir. 1981); *Valley National Bank of Arizona v. Trustee for Westgate-California Corp.*, 609 F.2d 1274 (9th Cir. 1979), *cert.*

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[1] Former Bankruptcy Rule 805, which concerned stays pending appeal, provided:

> Unless an order approving a sale of property or issuance of a certificate of indebtedness is stayed pending appeal, the sale to a good faith purchaser or the issuance of a certificate to a good faith holder shall not be affected by the reversal or modification of such order on appeal, whether or not the purchaser knows of the pendency of the appeal.

Former Fed. R. Bankr. P. 805 (1976). Bankruptcy Rule 8005, the current rule governing stays pending appeal, does not contain similar language, but analogous requirements now appear in 11 U.S.C. §§ 363(m) and 364(e).

denied, 444 U.S. 1015 (1980); *Bennett v. Gemmill (In re Combined Metals Reduction Co.)*, 557 F.2d 179 (9th Cir. 1977). Over the years, however, the relatively narrow holdings of these cases were gradually extended well beyond anything that could be supported by the principle on which they rested. (App., *infra*, 31a-33a.)

This gradual -- but significant -- expansion of the doctrine of "equitable mootness" has led the Circuits to adopt conflicting standards for determining whether a bankruptcy appeal is equitably moot. Some Courts of Appeals have adopted a very broad standard, holding that a bankruptcy appeal may be dismissed as "moot," even though effective relief remains available, if the reviewing court believes that it would be neither "prudent" nor "equitable" to grant relief. *See, e.g., Manges v. Seattle-First Nat'l Bank (In re Manges)*, 29 F.3d 1034, 1038-39 & n. 6 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1105 (1995); *In re UNR Industries*, 20 F.3d 766, 769 (7th Cir.), *cert. denied*, 115 S. Ct. 509 (1994).

Other Courts of Appeals have adopted a much different standard: an appeal is equitably moot only if effective relief is not available under all the circumstances. For example, in *First Union Real Estate Equity & Mortgage Invs. v. Club Assocs. (In re Club Assocs.)*, 956 F.2d 1065 (11th Cir. 1992), the Eleventh Circuit held that: "Even if substantial consummation has occurred, a court must still consider the circumstances of the case to decide *whether it can grant effective relief*." *Id.* at 1069 (emphasis added). As Judge Alito noted, this is a much different standard than adopted by the Third Circuit. (App., *infra*, 30a.).

Similarly, in *In re AOV Indus., Inc.*, 792 F.2d 1140 (D.C. Cir. 1986), *vacated in part on other grounds*, 797 F.2d 1004 (D.C. Cir. 1986), the District of Columbia Circuit held that: "Determinations of mootness * * * require a case-by-case judgment regarding the *feasibility or futility of effective relief* should a litigant prevail." *Id.* at 1147-48 (emphasis added). Likewise, in *Central States, Southeast and Southwest Areas Pension Fund v. Central Transp., Inc.*, 841 F.2d 92 (4th Cir.

1988), the Fourth Circuit held that a bankruptcy appeal should not be dismissed as equitably moot unless "implementation of the plan has created, extinguished or modified rights, particularly of persons not before the court, to such an extent that *effective judicial relief is no longer practically available*." *Id.* at 96 (emphasis added).

These conflicting standards have led to drastically different results in factually similar cases. In *Frito-Lay, Inc. v. LTV Steel Co., Inc. (In re Chateaugay Corp.) (Chateaugay II)*, 10 F.3d 944 (2d Cir. 1993), and *Aetna Casualty & Surety Co. v. LTV Steel Co. (In re Chateaugay Corp.) (Chateaugay III)*, 94 F.3d 772 (2d Cir. 1996) -- cases virtually on all fours with this one -- the Second Circuit held that substantial consummation of a plan of reorganization does *not* render an appeal by an administrative claimant moot where some form of meaningful relief can still be granted to the claimant without imperiling the reorganization or upsetting any reasonable reliance interest. 10 F.3d at 952-54; 94 F.3d at 775-76. Those cases involved the seven-year reorganization efforts of LTV Corporation and its affiliated debtors ("LTV") -- a proceeding easily as substantial and complicated as Continental's. After LTV's plan of reorganization had been substantially consummated, the Second Circuit heard the appeals of two creditors -- Frito-Lay and Aetna -- whose $62 million in administrative priority claims, including a claim for adequate protection, had been disallowed by the bankruptcy court. 10 F.3d at 948-49; 94 F.3d at 775.

In urging the Second Circuit to dismiss those appeals as moot, LTV argued that granting the requested relief would have a substantial impact on its reorganization. The Second Circuit rejected LTV's argument because effective relief could be fashioned without imperiling the reorganization or upsetting any reasonable reliance interest. 10 F.3d at 952-54. The Second Circuit adopted a five-part test. The focus of the Second Circuit's test was whether the court could "order some effective relief" without affecting the emergence of the debtor as a reorganized entity and without "unraveling intricate transactions." *Id.* Other considerations included whether

the parties affected were before the court and whether a stay had been diligently pursued. *Id.*

Here, too, effective relief also can be plainly fashioned under the Plan of Reorganization and no transfers need to be undone. The reorganized Continental, including the Investors, are before the Court. And, no stay was necessary as the Petitioners were merely seeking to enforce their rights under the Plan. Thus, under *Chateaugay II* and *Chateaugay III*, Petitioners' appeal would *not* have been dismissed as equitably moot and the Bankruptcy Court's decision on the Petitioners' adequate protection claim would have been heard on the merits.

Finally, as the Second Circuit recognized in *Chateaugay II* and *Chateaugay III*, the doctrine of "equitable mootness" should not be treated as a threshold question like constitutional mootness,[2] as the District Court and Third Circuit treated it here. Rather, equitable mootness should be regarded as a remedial concern, to be addressed after the merits of the appeal have been decided. 10 F.3d at 954; 94 F.3d at 775-76. As Judge Alito noted in his dissent, while the prudential considerations relied upon by the majority might warrant limiting Petitioners' remedy after their statutory right of review had been honored, they did not justify "slam[ming] the courthouse door" on Petitioners. (App., *infra*, 35a.)

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[2] *See Mills v. Green*, 159 U.S. 651, 653 (1895) (when "an event occurs which renders it impossible for this court, if it should decide the case in favor of the [appellant], to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal").

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

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